

# DISCRETION IN THE CAREER AND RECOGNITION JUDICIARY

NICHOLAS L. GEORGAKOPOULOS<sup>†</sup>

The author compares the career judiciary that is common in legal systems based on the continental European model with the recognition judiciary of some common law countries. This comparison of the incentives judges face and of the features that the selection process rewards in judicial candidates, shows the career judiciary tends to narrowly apply the law while the recognition judiciary tends to perceive interpretive latitude and exercise judicial discretion. The conclusion suggests introducing features of the recognition judiciary into career judiciary systems together with institutional features that will prevent discretion divorced from social preferences, mores, and needs.

## I. INTRODUCTION

A review of the judicial function should study in detail the institutional setting of the judiciary. Judges, like any group, are subject to the incentive structure of their environment. Exceptions will always exist, but rarely do judges perform in contravention of their incentives. The importance of promotion within the complex institutional structure of the judiciary is striking. The two legal systems in which I have worked differ markedly in this respect. I received my first law degree in Greece. Greece follows the continental European model of a career judiciary, where judges start at a low position soon after graduating from law school and are promoted to senior positions on the basis of their performance. I received my graduate degrees in the United States, where I now teach. The United States follows the common law model of a recognition judiciary, where judges are appointed late in their careers, after a full career as practitioners or academics. Judges are appointed to specific courts and face very long odds of reaching the highest court. This I will call the recognition judiciary, in contrast to the career judiciary, because judicial

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<sup>†</sup> Professor, University of Connecticut School of Law. I wish to thank Lofty Becker, Paul Berman, Mark Janis, Rick Kay, and Mark Ramseyer for their invaluable comments. An earlier version of this paper was presented at the University of Connecticut Law School Colloquium and benefited from comments there.

appointment constitutes, in part, recognition of the judge's previous career.<sup>1</sup> Because many jurisdictions choose either career or recognition judges, a comparative study is necessary.

The jurists who most readily accept the cynical realization that individuals respond to the incentives of their institutional environment are scholars of economic analysis of law. Numerous scholars study judicial conduct directly or indirectly through a study of judicial motives.<sup>2</sup> They are all American, however, and only one team does comparative work. Professors J. Mark Ramseyer and Eric Rasmusen present empirical studies of the Japanese career judiciary. They report that Japanese judges who in their youth joined leftist organizations were likely to receive less attractive judicial positions than their colleagues; that judges who decided against the government ran the risk of transfers to unattractive posts; and that judges who declared crucial parts of electoral law unconstitutional received less attractive posts than those who did not.<sup>3</sup> They also report that judges who convict and are reversed on appeal do not suffer any career penalty, while judges who acquit suffer a career penalty even if the acquittal is not reversed, and even more so if it is reversed.<sup>4</sup> Ramseyer's own explanation for the paradoxical difference between Japan and the United States is the expected ending to a repeated game of cooperation or defection (often referred to as the "prisoner's dilemma").<sup>5</sup> Ramseyer argues that in the United States, politicians do not expect to stay in power long, because no party holds power for long, but they expect the system to survive. Politicians in such an environment favor strong independent courts to preserve the politicians' influence after an electoral loss, even though strong courts limit their influence

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1. Numerous other judicial systems exist or can be devised. In many U.S. jurisdictions, for example, judges are elected. In other settings judges are specialists, often without legal education.

2. Chief Judge Richard A. Posner has had the most to say on this topic. See Richard A. Posner, *Overcoming Law* 1-168 (Harvard 1995). In *Overcoming Law*, Posner discusses the structure of the legal profession, that of the legal academy in the U.S., and that of the judiciary. *Id.* at 109-44. He has collected and discussed numerous works on judicial incentives in the economic analysis of law tradition. The motivating factors that surface are prestige, popularity, avoidance of reversal, reputation and citations, contribution to the shape of society (akin to a voter's enjoyment or civic pride), and spectator's enjoyment. Other authors in the economic analysis of law who have engaged the subject are Robert D. Cooter, Jeffrey N. Gordon, Richard S. Higgins and Paul H. Rubin, Bruce H. Kobayashi and John R. Lott, Jr., Lewis A. Kornhauser, William M. Landes (with Posner), Thomas J. Miceli and Metin M. Cosgel, Erin O'Hara, J. Mark Ramseyer, Eric Rasmusen, and Edward P. Schwartz. All of the authors are products of U.S. legal and/or economic education. Of the listed authors, the only ones whose work is comparative are Ramseyer and Rasmusen, as discussed below.

3. See J. Mark Ramseyer and Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: The Evidence from Japan*, 13 J L Econ & Org 259 (1997).

4. See J. Mark Ramseyer and Eric B. Rasmusen, *Why Is the Japanese Conviction Rate So High?* (draft, 1998).

5. See J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J Legal Stud 721 (1994).

while in power. In Japan, the governing party is unlikely to lose in elections (the Liberal Democratic Party has long been in power) and has little reason to limit its power through independent courts. In Imperial Japan's democracy, parties changed, but none expected the system to survive for long. Hence there was little to gain by reducing political power and retaining influence after a loss. This explanation, however, cannot apply to other career judiciary jurisdictions. For example, in the post-World War II environment, German, Belgian, Dutch, and Italian politicians had every reason to believe the system would survive, but little expectation of their party retaining power.

Generalizing Ramseyer's point leads one to overlook or trivialize a fundamental difference between a career and a recognition judiciary. Ramseyer's theory may accurately explain variations of independence and ensuing judicial discretion within career judiciary and recognition judiciary jurisdictions. If, however, it is used for a cross comparison of the two systems, it would fail because a host of incentives distort the comparison. On average, I expect jurisdictions with a career judiciary to produce an *ex ante* expectation of less judicial discretion and independence than jurisdictions with a recognition judiciary. However, some career jurisdictions with expansive judicial discretion (for example, Germany) may well exhibit greater discretion than recognition jurisdictions with narrow judicial discretion (for example, the United Kingdom).

Part II of this article defines the two judicial systems. Part III attempts to determine the incentives they provide to their members. Part IV concludes with an analysis of judicial independence and discretion in the two systems. Assuming that judicial discretion is desirable—which is strongly contested<sup>6</sup>—several policy recommendations spring forth. The authority of any branch of government (including the judiciary itself) to transfer judges should be considered contrary to a constitution that requires an independent judiciary. The number of judges in first instance courts should be very large compared to the number of appellate judges, and highest courts must be as few as possible, each with a very small number of judges.<sup>7</sup> Promotions to higher courts should

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6. I have supported judicial discretion in Nicholas L. Georgakopoulos, *Predictability and Legal Evolution*, 17 *Intl Rev L & Econ* 475 (1997). For its numerous opponents see, for example, Lino A. Gaglia, "Interpreting" the Constitution: *Posner on Bork*, 44 *Stan L Rev* 1019 (1992) (supporting narrow powers of judicial review and Robert Bork's arguments in *The Tempting of America: The Political Seduction of Law*); Raoul Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager's "Court-Stripping Polemic"*, 44 *Oh St L J* 611 (1983).

7. Jurisdictions of continental Europe have different administrative, civil and other highest courts, each often much larger than the nine-member single U.S. Supreme Court and state supreme courts of similar size. Germany has five highest courts. See Mauro Cappeletti, *The Judicial Process in Comparative Perspective* 49 n 132. France, Germany and Italy have over one hundred supreme court judges in each of the several supreme courts. See *id* at 49 & n 133.

be based on elements other than judicial performance; perhaps a pure seniority promotion to the appellate court and a qualitative selection from that to the highest court would be sufficient. Finally, once judicial discretion and independence is induced, mechanisms to channel that independence towards increasing social welfare should be considered.

In reviewing independence, however, we must not forget that its expansion trespasses on two other values of the legal and political system, accountability and democratic legitimacy. Accountability and legitimacy decrease as judges' independence increases. As soon as mechanisms for accountability and legitimacy enter, the possibility arises that judges will be held accountable not for dereliction of their duties but for exercising their discretion in a way that may be obnoxious to current political powers. This fear can be mitigated through the design of structures that control accountability and legitimacy while maintaining independence, but a trace of it will be present regardless. It is important to note that the mechanisms for social sensitivity discussed in the conclusion may be considered part of or substitutes for other mechanisms of the democratic legitimacy of the judiciary.

## II. CAREER AND RECOGNITION JUDICIAL STRUCTURES

The differences between the two structures are not only numerous, but they also depend on the details of how each judicial structure is formulated in each jurisdiction. Even within a jurisdiction, subsidiary judicial structures may be fashioned in a manner different from other parts of the judiciary. A typical example is the constitutional courts of several civil law countries, which have some recognition features inside jurisdictions that generally follow the career model.<sup>8</sup> Such discrepancies will also exist when a parent jurisdiction is a supranational coalition joining jurisdictions that may follow different approaches on judicial structure, such as the European Union or the North American Free Trade Agreement. Given the variety of the implementations of each style of judicial structure, the comparison that I will attempt to make can only be a comparison of archetypes. The comparison will be based on the terms and arrangements most representative of each system. By their very definition, the archetypes may not exist in pure form anywhere, since each jurisdiction that joins each classification (career or recognition) may have chosen to deviate

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8. Germany, France, Italy, Portugal, Spain, Austria, and Belgium are the European jurisdictions with separate constitutional courts. Their judges are appointed at ages averaging between fifty to sixty by the legislature from the non-judicial branches of the legal profession. Their terms are not usually renewable and vary from six to twelve years (from Portugal to Germany). See Nicos C. Alivizatos, *Judges as Veto Players*, in Herbert Doering, ed, *Parliaments and Majority Rule in Western Europe* 566 (St. Martin's 1995).

in some detail from the archetypal structure it has chosen. This comparison of archetypes will, hopefully, assist future comparisons of specific systems. Without further caveats, let us try to describe each archetype in turn.

### A. THE ARCHETYPAL CAREER JUDICIARY

The essence of a career judiciary is that judges are appointed to junior positions and are gradually promoted to senior positions. Senior positions typically include seats on the supreme court and special offices in the supreme court. Junior positions often correspond to judgeships in trial courts of first instance. In some career judiciary structures, junior judges may not sit on trial courts but may assist senior judges. The promotion track includes senior positions entitled to such assistants. The archetype, therefore, of a career judiciary means that judges' careers start early in the lower courts and that they have a reasonable expectation of being promoted to higher courts, contingent upon their performance. Notably, the life tenure of career judges does not attach to a specific court. Also notable is the great number of supreme court judges.

Career judiciary systems will most often assign life tenure to judicial positions. Tenure, however, may be awarded after a period during which the performance of the candidate is under review. The exact form of tenure in each judicial system will be crucial for its operation. Notable details include whether tenure protects from reduction in salary, from demotion to a lower court, or from transfer to a different court of equal seniority. The mechanism by which cases are assigned may also influence judges. If, for example, the chief judge has the power to assign cases, the chief may punish or reward a judge without any formal demotion or transfer. Random or sequential assignment of opinions would prevent this method of discipline. A full examination of the merits of different methods of opinion assignment is a different subject, unrelated to the comparison of career and recognition systems.<sup>9</sup>

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9. See Richard A. Posner, *Cardozo: A Study in Reputation* 145-47 (Chicago 1990), where Posner briefly discusses merits and drawbacks of assignment by rotation without reaching a conclusion. A drawback is that cases are not directed to the specialist in each area. Advantages are that in absence of specialization each judge performs a more idiosyncratic analysis that may lead to more innovative interpretations and a true discussion rather than the following of the specialist. Rotation increases the independence of each judge, since performance does not depend on having the favor of the chief judge. By the same token, rotation facilitates the comparison of judicial performance among members of the same court. Rotation makes case selection objective and, thus, reduces resentment and induces collegiality.

## B. THE ARCHETYPAL RECOGNITION JUDICIARY

The essence of the recognition judiciary is that judicial appointments are made after the candidates have already had their first legal career, that judges have life tenure in a specific court, and that the probability of promotion to a higher court is very small. Appointments may be made either by a combined action of the legislature and the executive or through a direct election, although elected judges usually do not fit the archetype because they do not have life tenure. One might have the impression that most common law jurisdictions have recognition judiciaries, but this archetype is probably representative of much fewer jurisdictions, particularly since most states in the U.S. have an elected judiciary. Moreover, institutional features that produce judicial incentives similar to a career judiciary may influence a system that is nominally considered a recognition judiciary.

Once an appointment to the recognition judiciary is made, the rarity of promotion to the next higher court influences judicial incentives. The single supreme court of recognition jurisdictions, with its nine or even fewer judges, produces a minuscule number of supreme court judges compared to the multiple supreme courts of career systems, each with tens or hundreds of judges. Thus, the recognition judiciary has a disproportionately smaller ratio of higher court to lower court judges. This leads to vastly smaller probability of promotion to the supreme court in recognition systems. The probability of promotion in recognition systems is further reduced by the fact that academics and practitioners may be appointed to appellate courts or to the supreme court without prior judicial service.

Many state judicial systems elect their judges for limited periods of time. This constitutes a radical departure from the concept that, once appointed, the recognition judiciary will not be reviewed. Elections serve as a mechanism of review of the judiciary by the electorate. The threat of removal by the electorate produces significant incentives that judges with life tenure do not have. Because the elected judiciary is such a departure from the norm of the recognition judiciary, for the purposes of this discussion, it will not be considered part of that structure's archetype, despite its prevalence in a majority of U.S. jurisdictions. This does not mean, of course, that the elected judiciary's incentives do not vary with the norms and institutional structure of each jurisdiction. Rules that shield sitting judges from contested elections, or that prevent some candidates from running for office may change judicial incentives significantly, but they will not be studied here. The archetype of the recognition judiciary will be considered here to be the life appointment of the U.S. federal judges and of judges in some Atlantic and Northeastern states.

Recognition judiciary jurisdictions can assign judges to specific courts, as is the custom in the U.S. As a result, the fear of a lateral reappointment, advantageous or disgraceful, which is present in the career judiciary, is absent from the recognition judiciary. Scholars have noted that nothing prevents the creation of a single U.S. federal appellate court, in which transfers would be controlled by the political machinery.<sup>10</sup>

Recognition judiciary jurisdictions show marked differences in the appointment of the chief judge. Some use a rotation system, in others a branch of government other than the judiciary appoints the chief, while in some cases the chief is selected by the court itself. Since much of this variety is also found in career systems, the method of selection of the chief judge, while potentially significant, is not coextensive with the comparison of career and recognition judicial systems.

The study of the archetypes can expand to include ever more features of the legal system. For example, the ease with which the legislature (or the populace through referenda) can overturn judicial interpretations of statutes and, through a constitutional amendment, of the constitution, also influences the liberty that judges have to use their discretion. The discussion of legislation and constitutional amendments as judicial incentives, however, takes us quite far from the influence of the structure of the judiciary on judicial independence and discretion. It is time to return to the study of the incentives that the two systems provide.

### III. INCENTIVES THAT THE TWO SYSTEMS PROVIDE

The overarching difference in the incentives that the two structures produce flows from the fact that in the recognition judiciary, judges' careers do not depend much on evaluations of their judicial performance. Without cause, judges cannot be discharged or transferred, and promotions are very unlikely. By contrast, the career of the judge in a career judiciary will strongly depend on evaluations of the judge's work at judging. In addition to direct incentives, the shape of judicial careers will influence the sense of collegiality between judges. The frequently reappointed career judge is likely not to feel as close to colleagues as the permanent recognition judge. Judicial performance will not depend only on the incentives produced by the career structure and collegiality

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10. See Ramseyer, *The Puzzling (In)Dependence of Courts* at 731-32 (cited in note 5). William M. Landes and Richard A. Posner analyze the unusually small amount of judicial interference by the executive in the U.S. judicial system in terms of a commitment enhancing mechanism (the one Ramseyer later used in comparing the U.S. and Japan). Independent courts enable politicians to implement policies that will be subsequently enforced even if the politicians lose in following elections. See Landes and Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J L & Econ 875, 879 (1975).

of judges but also on which jurists are attracted to, and selected for, the judiciary. The issue, as far as judicial performance is concerned, is to determine the effects that career incentives, collegiality bonds, and selection effects have on the judiciary.

#### A. JUDGES' CAREER INCENTIVES

A junior judge in a career judiciary is certainly aware that the favor of senior judges is valuable. Junior judges can avoid annoying senior judges in two obvious ways. First, they can follow the interpretations that higher courts adopt. Second, they can write opinions and maintain records in such a fashion that their decisions can be reviewed easily and quickly. Evidence that can be attributed to these two incentives is easy to find in continental European legal systems. Innovative interpretation by lower courts is much rarer than in most U.S. jurisdictions. Moreover, recognition courts tend to distinguish minute factual differences from previous cases much more often than their career counterparts. Thus, recognition judges more easily find themselves in unique new settings, in "first-impression territory," where their interpretive latitude is less bound by precedential restraints. By contrast, a habit of frequent distinguishing would produce innovation by lower courts that may irk appellate judges. Not only would easy distinguishing allow lower judges to reduce the breadth of the interpretations that appellate judges adopt, but it might also contravene the appellate judges' preferences, erode the authority of the senior courts, and permanently increase their workload. Appellate courts would not only have to decide whether to overrule the distinctions but they would also have to review the cases falling within the newly distinguished factual pattern in those instances where a distinction might not be overruled. Furthermore, career judges' opinions are practically always written as if different interpretations of the law are not open for consideration. The interpretation segment that constitutes the major part of common law opinions is entirely absent from civil law opinions. The practice of jumping from facts to application and conclusion characteristically puzzles common law jurists.

Judges in a recognition system realize that their careers do not depend on analogous minutiae of their judicial performance. Thus, they are free either to shirk their judicial work or to use their judicial work to enhance their welfare. Because shirking implies shrinking from notice and memory, people who have



reached the acclaim necessary to become judges in recognition systems may be sufficiently induced not to shirk.<sup>11</sup>

Judges who choose to promote their welfare will use their opinions to obtain power, gratification, and prestige, a fact long recognized by the literature. The malign interpretation of this would have the judges playing a hold-up game, impeding the goals of the legislature and the executive unless they appease judges. The benign interpretation would have judges pursue prestige in at least three arenas: intellectual, donative, and also physical. Intellectual prestige may be pursued by aggressive questioning of advocates, and by writing opinions that inspire citation by other judges and by academics. A path to citation, of course, is the production of differentiation, in other words, the detailed distinguishing of facts and rules in which common law judges excel. Moreover, intellectual prestige is furthered by the appearance of handling comfortably the complexities of the legal system, which in turn suggests displaying those complexities, if not contributing to them by further distinguishing. Thus, in contrast to career judges' incentives not to innovate, recognition judges have affirmative incentives for innovation.

Recognition judges' donative motives are satisfied when their interpretations promote social welfare. This would imply care for reputation outside the legal profession. Also, judges have an incentive corresponding to legal realism: to focus on the consequences of the application of the law even if at the expense of internal logical consistency of the legal system. Thus, recognition judges have a disincentive to practice formal interpretation.

Prestige can also be acquired through the physical setup of the courts. Grand buildings, imposing architecture, and majestic interior design should be expected to a greater degree in the recognition than in the career judiciary, as is in fact the case. The robes, wigs, and oral proceedings of common law courts, which from a continental standpoint are quaint and leisurely, conform to this point.<sup>12</sup> Moreover, satisfaction can also be derived from procedure. Titles, deference by the members of the bar, elaborate procedure presided upon by judges and determined by exercise of their discretion should also be expected to a greater extent in the recognition judiciary.

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11. This is a point repeatedly echoed in Judge Posner's writings. See, for example, Posner, *Overcoming Law* at 1-168 (cited in note 2) and Posner, *Cardozo: A Study in Reputation* (cited in note 9).

12. The grandeur of the common law trial also corresponds to one of the means Posner considers that judges use to promote their welfare, the spectator aspect of the judge. Posner argues that judges enjoy trials the same way a spectator enjoys a good play. See Posner, *Overcoming Law* at 126-35 (cited in note 2). Posner's argument does not directly explain how the spectator experience differs between recognition and career judges. Indirectly, of course, one can find Posner's argument consistent with the observed differences. The greater power that recognition judges wield results in their satisfying this desire more fully than career judges fulfill theirs.

In sum, recognition judges will have grander physical settings, more elaborate and discretionary procedure, be more concerned about the impact of their interpretations on society, and have stronger incentives for distinguishing, for elaborating the grounds for their interpretations, and for innovative interpretation than their career colleagues.

## B. THE SENSE OF COLLEGIALLY

It is important to note that in both systems a strong sense of collegiality is possible. Collegiality, however, is likely to find different expressions in the two systems, particularly in the type of group that feels the collegial bond. Given the likelihood of prolonged service at the same court and the small likelihood of promotion, in recognition systems collegiality is likely to be stronger among the judges of the same court and weaker among all judges compared to career judiciary collegiality. The collegiality of the career judiciary is shaped by the comparably frequent movement of judges between courts and by the existence of parallel career tracks, in the civil as opposed to the administrative judiciary, for example. Thus, the collegiality of the career judiciary should not be as tied to the particular court and should be stronger within the branch of the judiciary that corresponds to each career path (for example, collegiality within the civil judiciary, as opposed to the administrative judiciary).<sup>13</sup>

The most obvious expression of collegiality in the recognition system is the reluctance to overrule previous decisions, particularly those of the same court. Overruling undermines prestige and may lead to retaliation by other judges in the form of reciprocal overruling. As a result, recognition judges have developed an uncanny skill for distinguishing fact patterns from the facts that have led other judges to reach their prior holdings.<sup>14</sup> The result is an often

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13. It is interesting to note a conflict in which the German Constitutional Court prevented the German supreme court, which deals with civil and criminal matters only, from applying discretionary jurisdiction. See Cappelletti, *The Judicial Process in Comparative Perspective* at 50 n 135 (cited in note 7). The interaction of recognition (which might be the case of the German Constitutional Court, members of which are appointed by the legislature) and career judges in a single system is a fascinating topic for further research.

14. Circuit courts of appeal do not seem reluctant to diverge from others in their interpretation and thus create a circuit split. To the extent collegiality does not run to the other circuit courts, it may not influence splits at all. To the extent both courts gain exposure and prestige for having created the split, collegiality may even induce splits. Given the contradictory effects, conclusions about the effect of collegiality on splits must await further study. When different supreme courts of a career jurisdiction (for example, the supreme court on civil and criminal matters and that on administrative matters) create a split, analogous incentives may apply. In at least one case in Greece such a split was engineered, however, to push the dispute to yet another conflict-resolving supreme court, which the government expected to be more favorable to it than the supreme court of the branch of the judiciary that had jurisdiction over the dispute originally. The dispute was about the constitutionality of the law that restructured the Hellenic Universities, various provisions of which were held unconstitutional by the administrative supreme court, *Symboulion tes*

schizophrenic case law, that from reluctance to overrule preserves obviously wrong theories or develops exceptions that swallow the rule.<sup>15</sup> A beneficial side effect to this reluctance to overrule is that in addition to preserving the prestige of each judge, it promotes the prestige and the mystique to the entire legal system. The message it conveys is that judges are objectively applying the law instead of subjectively interpreting it; judges do not make errors, and decisions thus appear to have much greater permanence and influence than they actually have. This, of course, further promotes the prestige of the judge and the legal system.

Collegiality in the career judiciary finds very different expressions. I have already mentioned the reluctance of career judges to distinguish between factual patterns with minor differences. When junior judges avoid distinguishing the dispute before them from a dispute that has led to precedent by a higher court, they may be motivated by deference and a wish to reduce the higher court's load. When a judge in the career system, however, finds undesirable precedent of an equal or lower court, the judge's incentive to distinguish is mitigated by the ramifications of distinguishing; distinguishing conveys a signal of willingness to innovate which may not help a judge's career and it creates workload, whether to reverse or to observe the distinction. With distinguishing, collegiality is more likely to be put aside and reversals to take place. Junior judges realize this and shun innovation, saving prestige because they are not overruled, reducing the senior judges' workload, and providing senior judges with additional prestige and authority. Senior judges will neither need to reverse, nor decide whether to adopt a distinction, nor decide whether to distinguish. Moreover, they benefit from the knowledge that their opinions are more likely to be followed and are, in fact, followed. Thus, collegiality leads to lack of innovation in the career judiciary.

To the extent that higher court judges derive satisfaction from reversing lower courts, collegiality may also mitigate this incentive to reverse, particularly in the recognition system. Reversing is a risky proposition for higher courts, even if they do not feel collegial toward lower courts. Lower court judges can

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Epikrateias decision nos 2786, 2787, 2788, 2805, 2808, 2811 (1984), some of which are reproduced at 10 Syntagma 566, 586, and 646 (1984). Thereafter a labor action was instituted, subject to summary procedures, and a direct appeal to the civil supreme court was taken, which held the law constitutional, Areios Pagos decision no 1314 (1984), 10 Syntagma 674 (1984). The conflict-resolving court found the law constitutional, Anotato Eidiko Dik. decision no 30 (1985), 11 Syntagma 182 (1985).

15. If one agrees with this impression of the American common law, I must note that it also contradicts Ronald Dworkin's view that judges treat the law akin to a chain novel, writing the best opinion as constrained by the previous ones. Given judges' ability to overrule prior opinions, they could produce a much more logically coherent and aesthetically pleasing legal system by eliminating the contradictions and distinctions that infest the system. See Dworkin, *A Matter of Principle* 158-62 (Harvard 1985).

retaliate against reversals by ignoring or distinguishing and circumventing the new rule the higher court sets, forcing the higher court to engage more cases, reverse them, and overrule the distinctions.<sup>16</sup> Not only are career judges less likely to stage such an insurrection because of their incentives for docility, but such a threat would also tend to be less effective in the setting of a career judiciary. Given the additional work that such retaliation would cause to the higher courts, we should expect larger high courts to have the capacity to handle it more effectively. Since career judicial systems seem to be correlated with larger and more numerous highest courts, they can cope with the additional reversing that may be necessary to enforce their policies, because of both the reduced incentive for insurrection and the increased capacity of the highest courts to quell the insurrection.

### C. THE CONTEST AND SELECTION AMONG JUDICIAL CANDIDATES

The attributes that both career and recognition judicial systems reward in judgeship candidates are also diverse and multiple. Candidates in both, of course, must excel, but in a different way and perhaps to a different degree.

Differences in the degree of excellence required for a judicial appointment will consist of the percentile of juridical talent that is likely to receive a judicial appointment. Whether judges will be distributed in the top 5% or 50% of legal talent will depend on factors independent of the career or recognition character of the system, as well as on factors that may be related to that choice. The ratio of judges to lawyers in each legal system, which will have nothing to do with the existence of a career or a recognition judiciary, may depend on formalities such as a limitation for selection of judges from the ranks of barristers in the U.K. or from *bengoshi* in Japan. But it will also depend on how many other

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16. A characteristic example of such retaliation by a lower court in the U.S. legal system is *Epstein v MCA*, 126 F3d 1235 (9th Cir 1997), withdrawn and superseded on reh'g 170 F3d 641 (9th Cir 1999). Matsushita made a tender offer for MCA. Some shareholders of MCA had claims based on federal securities law as well as claims based on the corporate law of Delaware, where MCA was incorporated. A class action started in federal court over the federal claims, and another began in Delaware courts over the Delaware claims. Matsushita and MCA reached a settlement with the Delaware plaintiffs, which also disposed of the federal securities claims. The litigation pending in federal courts was then summarily dismissed on motion of Matsushita and MCA. The Ninth Circuit reversed the dismissal. The U.S. Supreme Court reversed the Ninth Circuit as having unconstitutionally withheld "full faith and credit" from the state court proceeding (the confirmation of the class settlement). On remand, the Ninth Circuit managed to return to its original position in favor of the plaintiffs. It found that the state procedure violated the plaintiffs' constitutionally protected right to "Due Process." In order to reverse again, the Supreme Court would have to engage at least one new question, the Due Process in state law settlements of class actions, which is likely to be much more contentious than the original "full faith and credit" issue. Of course, the Supreme Court would not reverse the Ninth Circuit by completely insulating state court settlements of class actions from Due Process attacks.

top eligible jurists desire to become judges, which, in turn, depends on the attractiveness of a judicial appointment. Judicial appointments will be of different subjective value to different individuals, but their average appeal will depend on both the tangible and intangible benefits associated with the position. Tangible benefits, including salaries, material and administrative support, staffing, and the quality and location of the courts and private chambers of the judges influence the material calculus. Effectively this will consist of the judiciary's budget and its endowment in the form of courtrooms, offices, and libraries. Intangible benefits would include the prestige judges enjoy, as well as the power and influence that they wield. Thus, if we accept that the career judiciary does not produce as much prestige, does not allow as much innovation, but induces judges to follow precedent more rigorously than the recognition judiciary does, we should expect the intangible benefits of career judges not to compare favorably on average with the intangible benefits of recognition judges.

One might expect that the way to compare the attractiveness of judgeships in two jurisdictions would be to compare the tangible benefits in the two jurisdictions and how far from the top legal talent is the group which joins the bench (what percentile, in other words, of legal talent does the bench represent). If two jurisdictions offer different tangible rewards to judges but attract the same percentile of the legal talent, one might think that the jurisdiction that provides fewer tangible rewards becomes equally attractive by offering larger intangible rewards. This would still be simplistic, however. The rewards of a career in practicing law and in the academy must also be compared and the cost of living in the two jurisdictions must be adjusted. We must also adjust for other factors, such as the ease of admission to the bar, the output of law schools, the nepotism that may exist in the legal profession (more nepotism would prevent able upstarts from attracting clientele and would make alternative legal careers more attractive) and so forth. A rigorous quantitative study of these factors is necessary before we can start drawing conclusions about the comparative power and prestige of the judiciary of different jurisdictions.

Like most reputation contests, the prestige of the judiciary will have a feedback effect<sup>17</sup> that will favor the judiciary of older and more stable

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17. The cascading effect of school reputation is well known. Consider, for example, the following quote on Harvard Law School from the turn of the century:

An institution which has any legal prestige and power, will make a money profit by raising its standard, and that either at once or in a very short time. Its demand for greater attainments on the part of its students will be quickly responded to, and this improved class of students will in a marvelously short time so increase the reputation and influence of the institution as to make its privileges and its rewards more valued and more valuable.

jurisdictions. As groups (such as schools, professions, etc.) compete for prestige in order to attract prestigious and powerful members, the group that succeeds in attracting the top candidates will find its prestige increased by its success. This, in turn, will make it easier to attract the top talent, because joining the group or profession will be seen as increasingly prestigious. If this infinite spiral never ends, then the prestige of the judiciary will depend on how old the jurisdiction is. But even if this process has an endpoint, where for the given structure of tangible and intangible rewards an unchanging percentage of top legal talent considers the judiciary attractive, each jurisdiction may approach that steady state very gradually and with differing speeds. Old jurisdictions, such as England or its ex-colonies (which may have inherited judicial prestige), will have more prestigious judiciaries compared to new jurisdictions, such as newly created countries or countries whose legal systems were radically restructured after the end of the World War II or the Cold War.

The attraction of a judgeship may have only a quantitative effect, in that it will influence what percentile of the top legal talent finds the bench attractive. Thus, it may not be directly relevant to judicial discretion, unless the different qualitative ranks of the legal profession tend to have a different capacity for exercising judicial discretion and creative interpretation. The signals that judicial candidates should send in order to be selected for appointment may have a more substantive influence on the nature of the judiciary. This factor appears clearer in the case of the recognition judiciary. Simple demonstration of analytical powers is not enough. Candidates for the recognition judiciary must be palatable to the executive and legislature that may appoint or confirm them and have the appeal (as distinct from prestige) that makes them desirable candidates compared to others of equal analytical powers or of comparable achievements. For candidates for the career judiciary, the process is very different. The selection process is usually an examination, perhaps followed by special study. This selection system will tend to emphasize encyclopedic and technical knowledge rather than the desirability of the candidate's general legal and political philosophy. Moreover, career judges are selected at an early age when personal legal and political philosophies have not yet crystallized. Therefore, analytical prowess may be enough for appointment to the career bench, which may have important ramifications.

To analyze the pre-appointment incentives of candidates for the recognition judiciary, we must not necessarily assume that a strong party-line

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Charles Warren, 2 *History of the Harvard Law School* 397 (Lewis 1908). See also Thorstein Veblen, *The Higher Learning in America: A Memorandum on the Conduct of Universities by Business Men* 98-123 (Hill & Wang 1957). For a more recent and deeper elaboration, see Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 *Tex L Rev* 403 (1998).

political past is an asset. Not only might the political system operate under a tacit agreement not to appoint extremists (in which case only centrist party associations would be a plus),<sup>18</sup> but in a system where confirmation and nomination is decided by bodies that may be controlled by different parties (something that may be a unique feature of the American legal system), appointees must be bipartisan enough or centrist enough not to incite resistance by the confirming authority. Perhaps it is the very fact that both parties must have a level of comfort with the appointees that adds to their appearance of impartiality and hence to their authority, power, influence, and, due to the apparent objectiveness of their selection, to their prestige. Such effects may be absent from common law jurisdictions with parliamentary systems that are not conducive to divided party control of the legislature and the executive or in which the nominating authority may depend on maintaining fragile coalitions in the legislature by appeasing splinter groups (as may be the case in Israel).

In essence, the politically appointed federal judges of the United States must show preeminence in their field without inciting either party to block their nomination, yet be politically attractive enough to the nominating party to get the nomination. It is not surprising that this system is said to reproduce the status quo by allowing only those who agree with the status quo to become judges.<sup>19</sup> However, an amicable equilibrium will not always obtain. Recently, the nomination and confirmation process has been so politicized that the Chief Justice of the United States, William Rehnquist, has gone on record citing the shortage of judges and the necessity for action by the Republican-controlled Senate, which was delaying nominees of the Democratic President.<sup>20</sup> Moreover, some believe that in the nominations after Robert Bork, the apparent trend has been for the executive to look for candidates who have not expressed their opinion directly enough to provoke an attack by the other side. Thus, the odds of nomination for judges and practicing lawyers have increased, while the odds of nomination for academic lawyers, who consider part of their job an obligation to analyze and opine on controversial legal topics, have decreased. If one thinks that academic lawyers' study of interpretation and the social

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18. Indeed, Democrats argued that the nomination of Robert Bork for the Supreme Court by President Ronald Reagan violated such an arrangement, as did the Republicans about the nomination, albeit to a non-judicial post, of Lani Guinier by President William Clinton. See J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts* at 728 (cited in note 5).

19. See, for example, Suzanna Sherry, *All the Supreme Court Really Needs to Know It Learned from the Warren Court*, 50 Vand L Rev 459, 477 (arguing that neutrality is an illusion used to perpetuate existing hierarchies, presumably including the neutrality of judges).

20. See John H. Cushman, Jr., *Senate Imperils Judicial System, Rehnquist Says*, NY Times A1 (Jan 1, 1998).

ramifications of rules would lead them to exercise desirably more discretion, their reduced potential is unfortunate. Since this is a recent phenomenon, we cannot know whether it will be short-lived. In the vortex of cross-currents, few effects are clear. The political process will reflect strongly on the selection of judges. A political or prosecutorial background is a plus. Extreme positions reduce the individual's chances for appointment. However, after the appointment is made, since judges will tend to have had high profiles, they are unlikely to be passive. Effectively, despite the centrism and silence that the system imposes before the appointment, the types of individuals it selects are unlikely to follow precedent blindly. The selection biases of the career judiciary are quite different.

The career judiciary often admits candidates through some central examination. Thus, because it admits its candidates without regard to their political views, it is free from selection biases similar to those of the American judiciary. A formal examination could, perhaps, weed out political undesirables if it were personal and sensitive to political attitudes: if it were oral instead of written, corrected with knowledge of the candidate's name, with questions that invite policy-based interpretation as opposed to simple application and technical interpretation. Japan, for example, is a career system that has a desire to weed out political undesirables but does not do so. Ramseyer's evidence that Japanese judges who had joined left-wing organizations were placed on an inferior track could be interpreted as evidence of Japan's inability to filter appointments according to the candidate's political positions.<sup>21</sup> A system that filtered by political conviction would not have made those appointments. Of course, given the narrow interpretation that dominates legal thinking in career judiciary jurisdictions, it is also likely that the nominators of judges never thought that prospective judges' political views were relevant in judging. They may have never thought to attempt to filter by political conviction.

Examining judicial candidates on technical skill also reinforces the mechanical application of the law that is popular in career judiciary jurisdictions. The candidates compete on their spectrum of legal knowledge, and on their ability to apply precedent faithfully. Thus, it is likely that social-policy minded jurists, who would interpret on the basis of social need, would find themselves being outscored in the examination by jurists who tend to apply rules mechanically. Thus, one could expect *ex ante* the career judiciary to select judges who will display less independence and innovation than the recognition judiciary, which tends to select high profiles who are unlikely to become passive after their appointment.

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21. See Ramseyer and Rasmusen, *Judicial Independence in a Civil Law Regime* (cited in note 3).



In sum, the selection effects suggest that the recognition judiciary will tend to exercise more discretion because it is not selected based on its adherence to precedent, but would have less variation in its views because it has a greater capacity to weed out political undesirables. The recognition judiciary's greater prestige will also tend to attract stronger legal talent to the bench, which may also suggest greater capacity for discretion. Recognition systems may also tend toward greater discretion by virtue of the appearance that the approval of judicial philosophies by the selection process licenses judges to exercise them, again with the caveat that judicial philosophies will tend to be centrist, at least in the United States.

#### IV. CONCLUSION: JUDICIARY STRUCTURE AND JUDICIAL DISCRETION

To conclude, I discuss the policy recommendations for which this study argues, assuming a jurisdiction wants either to increase or decrease the level of discretion that its judiciary exercises.<sup>22</sup> From the above discussion it should follow that the more mechanical application of the law, to which the career judiciary is induced and for which it is selected, means that the rules implemented by the legislature will be applied with less scrutiny, on average, than if they were being applied by recognition judges. This gives the legislative branch a greater ability to direct the legal system in a career jurisdiction.<sup>23</sup> By contrast, the recognition judiciary, particularly the federal judiciary of the United States, is likely to exercise its discretion sweepingly. Contrary to fears that the unaccountable judiciary will reduce social welfare (by repeating the dark—according to most—chapter of *Lochnerism*<sup>24</sup>), the judiciary has shown

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22. I have argued that the continuous change of the legal system that results from judicial independence is desirable in Georgakopoulos, *Predictability and Legal Evolution* (cited in note 6).

23. It is interesting to note that judicial control of the constitutionality of statutes is also more limited in the career judiciary legal systems. See Georgakopoulos, *Predictability and Legal Evolution* (cited in note 6). France and Germany use special constitutional courts, in the case of France constitutional challenges are limited in time and standing. *Id.* at 476. Since in many jurisdictions where courts routinely review the constitutionality of laws their power to do so was assumed by the courts directly, the fact that courts in many jurisdictions do not exercise this power may well indicate a docile judiciary. By the same token, however, the power to review the constitutionality of statutes allows more room for judicial discretion. Litigants have more arguments available to them about the applicability of the rules surrounding the dispute. Courts have more ways to find that they are not bound by the legislature's pronouncements on the topic, that they are in a first impression area, and exercise judicial discretion. Therefore, one could easily add to the recommendations of this article that judicial independence also requires general constitutional review of statutes by the judiciary.

24. In the latter part of the Nineteenth Century and the first of the Twentieth, the implementation of labor legislation was blocked by courts that considered mandatory maximum working hours—and other such provisions—infringements of workers' freedom of contract in violation of the Due Process clause of the Fourteenth Amendment. The most famous opinion in this regard is *Lochner v. New York*, 198 US 45

the capacity to implement welfare-increasing social change that a majority-dependent government cannot. The most apt example is considered to be the area of civil rights for minorities in the Fifties and Sixties. The integration of the public school system that was achieved with *Brown v Board of Education*,<sup>25</sup> for example, can either be considered a measure that the majority desired but feared to implement for its short-term costs, or a measure that would vastly increase the welfare of a minority with little discomfort for the majority. In either case, it was a welfare-increasing measure that a majoritarian legislature would not take. Only an independent judiciary would introduce such measures. It is important to remember, moreover, that no judiciary can enforce its rulings and, hence, is somewhat constrained by the public opinion that backs the executive. Furthermore, mechanisms can develop which can keep judges in touch with current social needs and realities. Such examples from the United States system are interventions by amici curiae, student-edited law reviews, and the hiring of recent law graduates as judicial clerks. An amicus curiae may submit a brief and, perhaps, participate in oral argument even though the party submitting it is not a part of the dispute. This allows parties influenced by the outcome to be heard in the process of reaching the decision. Student-edited law reviews ensure the publication of non-traditional legal pieces and social sensitivity is one of the editorial parameters. The youth of law clerks ensures that judges see a sample—biased and narrow as it may be—of a younger generation that has not yet been socialized into legal practice: the group, perhaps, within the legal profession that is most likely to carry opinions and preferences corresponding to those of the general population. Perhaps the United States judiciary was assisted by such socially-sensitive institutions in avoiding a repetition of the intransigence that it displayed in the early part of this century and the latter part of the previous one.<sup>26</sup>

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(1905), which Archibald Cox argues “symbolize[s] an era of conservative judicial intervention” that sought to arrest change. Cox, *The Court and the Constitution* 131 (Houghton Mifflin 1987). The notoriety of the *Lochner* opinion stems from Holmes’ famous dissent that “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics,” 198 US at 75.

25. 347 US 483 (1954). For the argument that the courts (and, more specifically, constitutional interpretation) protect minorities, see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 135-79 (Harvard 1980).

26. A recent journalistic account gives an interesting example of such an influence. In an article that recounts the changing standard in First Amendment interpretation that is moving away from strict separation of church and state toward equal treatment of religion, the New York Times focuses on the career of Professor Michael McConnell, a leading advocate of equal treatment of religion that would allow prayer in public schools and vouchers that could be used for religious schools. A brief account of his influence as a clerk to Supreme Court Justice William Brennan shows the influence that clerks may have: “McConnell’s first contribution to dismantling the wall of strict [church-state] separationism came during his Supreme Court Clerkship in 1981, when he helped persuade Justice Brennan to review *Widmar v. Vincent*.” Jeffrey Rosen, *Is Nothing Secular?*, NY Times, Magazine Section 40 at 43 (Jan 30, 2000). In

If, nevertheless, a reduction of judicial discretion is desired in a recognition system, it could be achieved by means of adopting some of the attributes of the career system. Judges should only be appointed to higher courts from the lower courts, perhaps even on a pure seniority system. This would also revoke the apparent license to exercise one's judicial philosophy. A norm that judges should be selected from a narrow subset of the legal profession, such as litigators, would tend to reduce judicial discretion, as would the requirement of a technical examination. Discretion would also tend to be reduced by placing impediments on judges' realizing their prestige. A norm of unsigned opinions would prevent judges from achieving recognition and enjoying reputation; a revocation of their authority to determine trial procedure would have a similar effect, as would the implementation of trials by record, as opposed to oral trials.

If a legal system were to subscribe to the notion that increased judicial independence and discretion is desirable, the aspects of the career judiciary that need adjusting are apparent. The power to transfer judges, the frequency and great likelihood of promotions, and the examination of technical legal skill for the admission to the judiciary are at the source of the docile nature of career judges.<sup>27</sup> The transfer issue is the easiest to cure. Most constitutions include the statement that the judiciary is an independent branch of government. Such clauses should be interpreted as directly prohibiting transfers of judges by a different branch, executive or legislative. Given the importance that neither the threat nor the appeal of transfers motivate judges, the constitutional requirement of an independent judiciary should be further interpreted to imply that no transferring authority is constitutional, even if that power lies with the judiciary.

The likelihood of a promotion makes career judges seek it by not displaying independence. This effect may be harder to cure because it would require a major restructuring of judicial administration in most career jurisdictions. A constitutional amendment will most likely be needed to reduce

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*Widmar v Vincent* the District Court had upheld the prohibition of use of state university property for religious worship or teaching at the University of Missouri at Kansas City. The Supreme Court interpreted the First Amendment to require that religious and non-religious speakers be treated equally. *Widmar v Vincent*, 454 US 263 (1982).

27. Independence also requires that courts have the authority to check the constitutionality of statutes. See Georgakopoulos, *Predictability and Legal Evolution* (cited in note 22). This can be implemented directly by the courts by adopting the general constitutional principle that courts must control constitutionality. Such an argument has been preempted by the design of the constitution in jurisdictions such as France and Germany, which have special constitutional courts. If a constitution contains such a mechanism, courts must still assume the power to control constitutionality because its control cannot be limited, as well as because the power to control constitutionality is a component of judicial independence that most constitutions directly mandate.

the number of highest courts. The reduction of the number of judges in the highest courts may be easier, as should be the reduction of the number of appellate judges. This reduction may be particularly problematic in jurisdictions where appellate courts try the facts *de novo*. A possible solution may be the creation of a new appellate level. Thus, a jurisdiction that had three levels of courts, first instance, *de novo* appellate, and supreme, would divide its supreme court into an appellate review and a final review, neither of which try the facts *de novo*. Since most supreme courts are likely to have some process for review, this change may be a comparatively simpler matter. The final review should be made by a court of discretionary jurisdiction consisting of just a few judges (a small panel of the highest court, perhaps) who are appointed to the panel for life.

Finally, independence seems to be fostered by the appointment of accomplished jurists to the bench, particularly at the appellate and highest level. The further a system can move from examinations and the closer it can move towards a meritocratic appointment process based on previous accomplishments, the likelier would be the appointment of jurists who would seize the opportunity for independence.

A cautionary note, however, is in order. Discretion may be exercised in an undesirable way, decreasing social utility. It is important that legal systems develop institutions that provide a gentle incentive for judges to stay with the times. Specific recommendations cannot be made because of the context-sensitive nature of the problem. In some societies, a desire for positive reputation may be enough to inhibit reactionary judges. An active and non-formalistic legal academia with its legal journals and publications may be enough to create a market in reputation that will motivate judges. Young legal assistants, modeled after the American institution of judicial clerks, may also help. Judicial awareness of the social utility function will be more difficult to develop than judicial independence. Independence can be had, because judges would naturally develop it, if their incentives for narrow following of the higher courts were removed. Institutions to induce social responsibility other than the *amicus curiae* intervention cannot be designed without intimate knowledge of the details of each jurisdiction's institutional structure. It is impossible to say whether such institutions will take the shape of their American counterparts, with their reliance on judges' own desire for reputation, or along entirely different lines, such as intra-judiciary reviews by the junior judges of senior judges' work, independently or in connection with a promotion to the supreme court, or other feedback by social groups on prospective opinions or on judges' work. Those institutions will embody the proper exercise of democratic means to influence a truly independent judiciary,

the authority of which, after all, rests with the social welfare that its opinions create.

